

### § 1114.31

sample any tangible things which are in the possession, custody, or control of the party upon whom the request is served, but if the writings or data compilations include privileged or proprietary information or information the disclosure of which is proscribed by the Act, such writings or data compilations need not be produced under this rule but may be provided pursuant to § 1114.26(b) of this part; or

(2) To permit, subject to appropriate liability releases and safety and operating considerations, entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspecting and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon.

(b) *Procedure.* Any request filed pursuant to this rule should set forth the items to be inspected either by individual item or by category and describe each item and category with reasonable particularity. The request should specify a reasonable time, place, and manner of making the inspection and performing the related acts.

(c) *Limitation under simplified standards.* In a case using the Three-Benchmark methodology, each party is limited to ten document requests (including subparts) absent advance authorization from the Board.

(d) *Agreements containing interchange commitments.* In any proceeding involving the reasonableness of provisions related to an existing rail carrier sale or lease agreement that serve to induce a party to the agreement to interchange traffic with another party to the agreement, rather than with a third-party connecting carrier, whether by outright prohibition, per-car penalty, adjustment in the purchase price or rental, positive economic inducement, or other means, a party to the proceeding with a need for the information may obtain a confidential, complete version of the agreement, with the prior approval of the Board. The party seeking such approval must file an appropriate motion containing an explanation of the party's need for the information and a draft protective order and undertaking(s) that will ensure the agreement is kept confidential. The motion

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seeking approval may be filed at any time after the initial complaint or petition, including before the answer to the complaint or petition is due. A reply to such a motion must be filed within 5 days thereafter. The motion will be considered by the Board in an expedited manner.

[61 FR 52713, Oct. 8, 1996, as amended at 72 FR 51377, Sept. 7, 2007; 73 FR 31034, May 30, 2008]

### § 1114.31 Failure to respond to discovery.

(a) *Failure to answer.* If a deponent fails to answer or gives an evasive answer or incomplete answer to a question propounded under § 1114.24(a), or a party fails to answer or gives evasive or incomplete answers to written interrogatories served pursuant to § 1114.26(a), the party seeking discovery may apply for an order compelling an answer by motion filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board and served on all parties and deponents. Such motion to compel an answer must be filed with the Board within 10 days after the failure to obtain a responsive answer upon deposition, or within 10 days after expiration of the period allowed for submission of answers to interrogatories. On matters relating to a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order.

(1) *Reply to motion to compel generally.* Except in rate cases to be considered under the stand-alone cost methodology or simplified standards, the time for filing a reply to a motion to compel is governed by 49 CFR 1104.13.

(2) *Reply to motion to compel in stand-alone cost and simplified standards rate cases.* A reply to a motion to compel must be filed with the Board within 10 days thereafter in a rate case to be considered under the stand-alone cost methodology or under the simplified standards.

(3) *Conference with parties on motion to compel.* Within 5 business days after the filing of a reply to a motion to compel in a rate case to be considered under the stand-alone cost methodology or under the simplified standards, Board staff may convene a conference with

the parties to discuss the dispute, attempt to narrow the issues, and gather any further information needed to render a ruling.

(4) *Ruling on motion to compel in stand-alone cost and simplified standards rate cases.* Within 5 business days after a conference with the parties convened pursuant to paragraph (a)(3) of this section, the Director of the Office of Proceedings will issue a summary ruling on the motion to compel discovery. If no conference is convened, the Director of the Office of Proceedings will issue this summary ruling within 10 days after the filing of the reply to the motion to compel. Appeals of a Director's ruling will proceed under 49 CFR 1115.9, and the Board will attempt to rule on such appeals within 20 days after the filing of the reply to the appeal.

(b) *Failure to comply with order.* (1) If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the Board, such refusal may subject the refusing party or person to action by the Board under 49 U.S.C. 721(c) and (d) to compel appearance and compliance with the Board's order.

(2) If any party or an officer, director, managing agent, or employee of a party or person refuses to obey an order made under paragraph (a) of this section requiring him to answer designated questions, or an order made under § 1114.30 requiring him to produce any document or other thing for inspection, copying, testing, sampling, or photographing or to permit it to be done, or to permit entry upon land or other property, the Board may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which questions were asked, or the character or description of the thing or land, or the contents of the paper, or any other designated facts should be taken to be established for the purposes of the proceeding in accordance with the claim of the party obtaining the order:

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evi-

dence designated documents or things or items of testimony:

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the proceedings or any party thereof.

(iv) In lieu of any of the foregoing orders, or in addition thereto, the Board shall require the party failing to obey the order or the attorney advising that party, or both, to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) *Expenses on refusal to admit.* If a party, after being served with a request under § 1114.27 to admit the genuineness of any document or the truth of any matter of fact, serves a sworn denial thereof, and if the party requesting the admission thereafter proves the genuineness of any such document or the truth of any such matter of fact the Board may order the party making such denial to pay to such other party the reasonable expenses incurred in making that proof, including reasonable attorney's fees.

(d) *Failure of party to attend or serve answers.* If a party or a person or an officer, director, managing agent, or employee of a party or person willfully fails to appear before the officer who is to take his deposition, after being served with a proper notice, or fails to serve answers to interrogatories submitted under § 1114.26, after proper service of such interrogatories, the Board on motion and notice may strike out all or any part of any pleading of that party or person, or dismiss the proceeding or any part thereof. In lieu of any such order or in addition thereto, the Board shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the Board finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(e) *Expenses against United States.* Expenses and attorney's fees are not to be

imposed upon the United States under this rule.

[47 FR 49562, Nov. 1, 1982, as amended at 61 FR 52713, Oct. 8, 1996; 68 FR 17313, Apr. 9, 2003; 69 FR 58366, Sept. 30, 2004; 72 FR 51377, Sept. 7, 2007; 74 FR 52908, Oct. 15, 2009]

## PART 1115—APPELLATE PROCEDURES

Sec.

1115.1 Scope of rule.

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1115.3 Board actions other than initial decisions.

1115.4 Petitions to reopen administratively final actions.

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1115.7 Petitions for judicial review; mailing address.

1115.8 Petitions to review arbitration decisions.

1115.9 Interlocutory appeals.

AUTHORITY: 5 U.S.C. 559; 49 U.S.C. 721.

SOURCE: 47 FR 49568, Nov. 1, 1982, unless otherwise noted.

### § 1115.1 Scope of rule.

(a) These appellate procedures apply in cases where a hearing is required by law or Board action. They do not apply to informal matters such as car service, temporary authority, suspension, special permission actions, or to other matters of an interlocutory nature. Abandonments and discontinuance proceedings instituted under 49 U.S.C. 10903 are governed by separate appellate procedures exclusive to those proceedings. (See 49 CFR part 1152)

(b) Requests for appellate relief may relate either to initial decisions or to Board actions other than initial decisions. For each category, this rule describes the types of appeal permitted, the requirements to be observed in filing an appeal, provisions for stay of the action, and the status of the action in the absence of a stay.

(c) Appeals from the decisions of employees acting under authority delegated to them by the Chairman of the Board pursuant to § 1011.6 will be acted upon by the entire Board. Appeals must be filed within 10 days of the date of the action taken by the employee, and responses to appeals must be filed within 10 days thereafter. Such appeals

are not favored; they will be granted only in exceptional circumstances to correct a clear error of judgment or to prevent manifest injustice.

[47 FR 49568, Nov. 1, 1982, as amended at 61 FR 52714, Oct. 8, 1996; 69 FR 12806, Mar. 18, 2004]

### § 1115.2 Initial decisions.

This category includes the initial decision of an administrative law judge, individual Board Member, or employee board.

(a) An appeal of right is permitted.

(b) Appeals must be based on one or more of the following grounds:

(1) That a necessary finding of fact is omitted, erroneous, or unsupported by substantial evidence of record;

(2) That a necessary legal conclusion, or finding is contrary to law, Board precedent, or policy;

(3) That an important question of law, policy, or discretion is involved which is without governing precedent;

(4) That prejudicial procedural error has occurred.

(c) Appeals must detail the assailed findings with supporting citations to the record and authorities.

(d) Appeals and replies shall not exceed 30 pages in length, including argument, and appendices or other attachments, but excluding a table of cases and an index of subject matter.

(e) Appeals must be filed within 20 days after the service date of the decision or within any further period (not to exceed 20 days) the Board may authorize. Replies must be filed within 20 days of the date the appeal is filed.

(f) The timely filing of an appeal to an initial decision will stay the effect of the action pending determination of the appeal.

(g) If an appeal of an initial decision is not timely filed or the Board does not stay the effectiveness on its own motion, the order set forth in the initial decision shall become the action of the Board and be effective at the expiration of the time for filing, unless otherwise provided.

[47 FR 49568, Nov. 1, 1982, as amended at 54 FR 19894, May 9, 1989; 61 FR 52714, Oct. 8, 1996]